UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

FONDO PARA EL FOMENTO DE INDUSTRIA LECHERA[1]

Employer

and

CENTRAL GENERAL DE TRABAJADORES #2, INC.[2] Case: 24-RC-8685

Petitioner

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION (OPEIU), AFL-CIO, CLC[3]

Incumbent

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* (hereinafter "the Act") as amended, a hearing was held on September 29, 2010, before a hearing officer of the National Labor Relations Board, herein the Board, to determine whether a question concerning representation exists, and if so, to determine the appropriate unit for collective bargaining. Pursuant to the

[1] The Employer's name appears as amended at the hearing.
[2] The Petitioner's name appears as amended at the hearing.
[3] The Incumbent, whose name also appears as amended at the hearing, intervened on the basis of its status as the certified collective bargaining representative of the employees in the unit involved herein which certification issued on September 15, 2009.

provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[4]

I. ISSUES AND DETERMINATION

The issues in this proceeding are twofold: a) whether the instant petition is timely filed under the Board's one year certification rule, and b) whether the collective bargaining agreement between the Employer and Incumbent, executed only hours after the Employer was notified of the filing of the instant petition, constitutes a bar to an election.

Having examined the entire record in this proceeding, and for the reasons set forth below, I have concluded that the instant petition was timely filed and that the contract between the Employer and the Incumbent does not constitute a bar to an election.

II. THE UNIT[5]

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9(b) of the Act.

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[4] All parties filed their respective briefs in support of their positions, which were duly considered. Upon the entire record in this proceeding the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
b. The parties stipulated that the Employer, Fondo Para el Fomento de Industria Lechera, with its place of business in San Juan, Puerto Rico, promotes the consumption and quality control of fresh milk. During the past twelve month period, the Employer had gross revenues derived from its operations valued in excess of $500,000.00 and purchased and received materials and supplies valued in excess of $50,000.00 from points and places located outside the Commonwealth of Puerto Rico.
c. Based upon the facts in section b above, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
d. The parties stipulated and I find that the Petitioner and Incumbent are labor organizations within the meaning of Section 2(5) of the Act.
e. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c) (1) and section 2(6) and (7) of the Act.

[5] The parties stipulated to the unit at the hearing.

> **Included**: All regular full-time and part-time employees including dairy quality program inspectors, clerical employees that provide services to the public schools lunch room programs, laboratory analysts, secretaries and clerical employees, data-entry employees, and sample carriers employed by the Employer at its place of business at San Juan, Puerto Rico.
>
> **Excluded**: All other employees, managers, confidential employees, guards and supervisors as defined by the Act.

III. FACTS

The facts of this case are essentially undisputed. On September 15, 2009, the Incumbent was certified as the exclusive collective bargaining representative of the above-described Unit of employees.[6] The record does not reveal whether there were any collective bargaining agreements between the parties prior to September 15, 2009. However, it appears that from the date of the certification to the date of the filing of the instant petition, the parties had been actively engaged in negotiations. According to the Employer and Incumbent, about September 14, 2010, the parties concluded negotiations after they reached a "meeting of the minds". To this end, it was their intent to sign the negotiated oral understanding on the afternoon of September 15, 2010.

However, the undisputed facts reflect that the instant petition was filed by the Petitioner in the Regional Office on September 15, 2010, at around 10:11 a.m. At around 11:21 a.m., the Petitioner sent a copy of the instant petition via facsimile to the Employer's Human Resources Director, Maria Lopez, to the Employer's attorney and chief negotiator, Fernando Baerga, and to the Incumbent's attorney, Cesar A. Rosado.

[6] The Incumbent was initially certified as the exclusive collective bargaining representative of the stipulated unit in Case 24-RC-8451 on April 25, 2005 and again on September 15, 2009 in Case 24-RD-525.

Later that same day, at around 3:00 p.m., the Employer and Incumbent initialed and signed the contract which is now offered as a bar to the instant petition.[7]

IV. LEGAL ANALYSIS OF ISSUES

A. Certification Bar

Once a labor organization has been certified as the exclusive collective bargaining representative of a unit of employees under Section 9 of the Act, the Board's longstanding policy has been that any petition for representation or decertification filed within the one year following certification will be dismissed as untimely, absent unusual circumstances. The purpose behind such protection, which has come to be known as the "one year certification rule", is to encourage the execution of a collective bargaining contract and preserve industrial peace following the certification of a new bargaining representative. Brooks v. NLRB, 348 U.S. 96 (1954); Kimberly-Clark Corporation, 61 NLRB 90 (1945); Den-Tal-Ez, Inc., 303 NLRB 968 (1991). Accordingly, a newly certified union is afforded a full opportunity, at least within one year, of arriving at an agreement with an employer free from challenge as to its majority status from any rival unions, dissatisfied employees or employer. Beverly Manor Health Care Center, 322 NLRB 881 (1997).[8]

[7] Employer's attorney and lead spokesperson Fernando Baerga testified during the hearing on this topic.

[8] The 1-year certification rule as described above is not to be confused with the 12-month limitation on holding elections provided by Section 9(c)(3) of the Act, which rests on different considerations. Ekco Products Co., 117 NLRB 137 (1957). Section 9(c)(3) was designed to ban the holding of elections more often than once a year and thereby avoid disrupting an employer's plant with too frequent Board elections. Fruitvale Canning Co., 85 NLRB 684, 686 (1949). The one year limitation period imposed by Section 9(c)(3) begins to run from the date of the balloting, and not from the date of final determination of the results. Palmer Mfg. Co., 103 NLRB 336, 337 (1953). Thus, while the 1-year certification rule requires the dismissal of any petition filed within one year after the certification of the union, Section 9(c)(3) prohibits the holding of an election in the one year period following a valid election.

In their post-hearing briefs, the parties essentially agree that Board precedent establishes that any petition for representation filed before the last day of the certification year would be untimely and, as a result, dismissed. National Furniture Co., Inc., 119 NLRB 328 (1957). Thus, the main issue raised is when the computation of the one year certification rule begins. For the reasons more fully set forth below, the one year certification period begins from the very date that an incumbent union is certified, not the day after as advanced by the Employer and Incumbent.

Both the Employer and the Incumbent, contrary to the Petitioner, argue that, in order to compute the starting date of the one year certification rule, the Board should apply Section 102.111(a) of its Rules and Regulations.[9] However, the one year certification rule does not originate from the Board's Rules and Regulations or from the Act itself. In approving the Board's discretion to establish such a rule, the U.S. Supreme Court noted that although the rule itself is a pronouncement by the Board, it is not a requirement of the Act. Brooks v. NLRB, supra. Thus, the Board's Rules and Regulations do not apply to the 1-year certification rule.

In my view, the following case scenarios provide the answer to the question posed by the instant facts. For example, in Dewey and Almy Chemical Company, 102 NLRB 940 (1953), the incumbent union argued that a petition filed by a rival union was premature because it was filed during the certification year. Similar to the instant case, the incumbent union had been certified on November 12, 1951, while the rival union's

[9] Section 102.111(a) of the Board's Rules and Regulations states, in its pertinent part, that "In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the official closing time of the receiving office on the next Agency business day…"

petition was filed on November 12, 1952. The Board held that the petition was timely because the petition was filed on the first day after the certification year had expired. In reaching this conclusion, the Board held that it counted the effective date of the certification year in the same manner that it would if a contract were involved.

Another example is shown in Pioneer Division, 109 NLRB 1273 (1954), where the incumbent union, certified on November 5, 1952, executed a contract with the employer on March 16, 1953, which agreement expired on November 4, 1953. In narrating the facts of this case, the Board specifically referred to this distinction by finding that "[o]n November 5, 1953, the day after the certification year expired, a rival union filed a representation petition." It is interesting to note that in this reported case, as in the case at bar, the employer and the incumbent union signed a collective bargaining on the same date that the rival union petition was filed. The Board disagreed with the employer and the incumbent and found that the contract did not bar an election and that the petition was timely. More recently, in LTD Ceramics, Inc, 341 NLRB 86 (2004), the ALJ with Board approval found that a certification issued on July 16, 1998 had ended on July 15, 1999.

As shown above, the Board clearly includes the date the certification is issued, not the following day as argued by the Employer and Incumbent, in calculating the duration of the certification year. In this regard, the Supreme Court in Brooks v. NLRB, *supra*, while affirming the appropriateness of the Board's discretion in establishing the one year certification rule, mentioned that "…the one-year period should run from the date of certification rather than the date of election…"

Applying the above principles to the present case, the undisputed facts show that the petition was filed on September 15, 2010, the anniversary date of the Incumbent's September 15, 2009 certification. Thus, the one year certification period had already expired on September 14, 2010. Therefore, I find that the instant petition was timely filed and the one year certification rule does not preclude the processing of the instant petition.

B. Contract Bar

The second issue in the present case is whether or not the contract between the Employer and Incumbent signed on the same date the instant petition was filed constitutes a bar to holding an election. On this topic, the Board has long held that, for contract bar purposes, an agreement must meet certain formal and substantive requirements, including the requirement that the document proposed as a bar be signed by all the parties to the agreement prior to the filing of a petition that it seeks to bar. Appalachian Shale Products Co., 121 NLRB 1160, 1162 (1958). Even if the parties agreed that the terms of the contract will apply retroactively, if the contract is signed after the filing of a petition, which was the case here, it will not serve as a bar to an election. Appalachian Shale, supra at 1161-1162; Hotel Employers Assn. of San Francisco, 159 NLRB 143 (1966). The party asserting that a contract operates as a bar bears the burden of proving that the agreement was signed by the parties prior to the filing of a petition. Roosevelt Memorial Park, Inc., 187 NLRB 517 (1970).

In the present case, the undisputed facts clearly show that the Employer and the Incumbent signed and executed the collective bargaining agreement around 4 to 5 hours after the filing of the instant petition. In such a case, when a rival union's petition

and a valid contract between the employer and an incumbent union are executed on the same day, the contract will bar an election unless it is effective prospectively or unless the employer had actual notice when the contract was executed that the rival petition had been filed earlier on that day. Deluxe Metal Furniture, Co., 121 NLRB 995, 999 (1958); Rappahannock Sportswear Co., 163 NLRB 703 (1967).[10]

In this regard the record shows that the Petitioner sent a copy of its petition via facsimile to the Employer and Incumbent about 3 to 4 hours before they met later that day to sign and execute the contract.[11] Under such circumstances, I find that the contract signed between the Employer and the Incumbent, only hours after the Employer was notified of the filing of the instant petition, does not constitute a bar to an election.

V. CONCLUSION

Accordingly, having concluded the instant petition was timely filed and that the contract between the Employer and Incumbent, which was executed after the Employer had notice of the filing of the instant petition, does not constitute a bar to the processing of the instant petition, I shall direct an election in the unit described above in Section II.

There are approximately 35 employees in the bargaining unit.

[10] The filing date is when the petition is received in the Regional Office. See also National Broadcasting Co., 104 NLRB 587 (1953); Herdon Rock Products, 97 NLRB 1250 (1951); and Aramark School Services, Inc., 337 NLRB 1063 (2002). A petition is regarded as received in the Regional Office even if the mechanical details of filing have not been completed by the affixing of the date and time stamp Campbell Soup Co., 175 NLRB 452 (1969). Also, the Board has found no prejudice to an employer where it received notice of the filing of the petition a few hours before the petition was actually received in the Regional Office. As long as the employer was informed prior to its signing of the contract, the notice requirement was held fulfilled. Rappahannock Sportswear Co., supra. Merely informing the employer of a petitioner's representative interest, however, and not of the filing of the petition, does not meet the requirement. Boise Cascade Corp., 178 NLRB 673 (1969).

[11] The Employer's attorney, Fernando Baerga, testified at the hearing in this regard.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Central General de Trabajadores #2, Inc., Office and Professional Employees International Union (OPEIU), AFL-CIO, CLC or neither. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began

more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **October 29, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website,

www.nlrb.gov,[12] by mail, or by facsimile transmission at (787) 766-5478. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **November 5,**

[12] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

2010. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may not be filed by facsimile.

DATED: October 22nd, 2010

/s/

Marta M. Figueroa
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[13] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.